

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the	)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of Fixed	)	RM-10586
and Mobile Broadband Access, Educational and Other	)	
Advanced Services in the 2150-2162 and 2500-2690	)	
MHz Bands	)	
	)	
Part 1 of the Commission's Rules - Further Competitive	)	WT Docket No. 03-67
Bidding Procedures	)	
	)	
Amendment of Parts 21 and 74 to Enable Multipoint	)	MM Docket No. 97-217
Distribution Service and the Instructional Television	)	
Fixed Service to Engage in Fixed Two-Way	)	
Transmissions	)	
	)	
Amendment of Parts 21 and 74 of the Commission's Rules	)	WT Docket No. 02-68
With Regard to Licensing in the Multipoint Distribution	)	RM-9718
Service and in the Instructional Television Fixed Service	)	
for the Gulf of Mexico	)	
	)	

**PETITION FOR PARTIAL RECONSIDERATION**

Clearwire Corporation ("Clearwire"), through counsel and pursuant to Section 1.429 of the Commission's rules, seeks partial reconsideration or clarification of one aspect of the *Report and Order and Further Notice of Proposed Rulemaking*<sup>1</sup> in which the Commission advances its agenda to reform the rules that govern the Broadband Radio Service ("BRS") and the Educational Broadband Service ("EBS"). Specifically, Clearwire urges the Commission to

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<sup>1</sup> *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) ("*Report and Order*").

clarify and provide more detail regarding the cost-sharing mechanism that will apply to transition-related costs.<sup>2</sup>

The new regulatory framework for EBS and BRS that was adopted by the Commission in the *Report and Order* is an excellent first step to implement legal and technical rules that will promote the availability of wireless broadband services across the country, promote the economic viability of such services using EBS and BRS spectrum, and foster expeditious deployment of wireless broadband systems. The new rules, including the new de-interleaved bandplan, the additional spectrum allocated for BRS in the band, the geographic licensing scheme, the technical rules, the “splitting the football” approach for defining geographic service areas, and the plan for transitioning the spectrum to the new bandplan should ensure that this very valuable spectrum no longer lays fallow and will be put to its highest and best use by incumbent operators and new competitors. However, the Commission must ensure that it adopts a cost-sharing mechanism for transition-related costs that is equitable and does not encourage late-deployments or free-riders.

## **I. INTRODUCTION.**

Clearwire was founded by Craig McCaw in 2003 to provide competitive broadband wireless services to residential and small business customers throughout the United States and

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<sup>2</sup> Clearwire formerly participated in this proceeding through its subsidiary, Fixed Wireless Holdings, LLC, and it has been working with the Wireless Communications Association International (“WCAI”) and other industry participants on comments in this rulemaking. Clearwire supports the petition for reconsideration filed by the WCAI with respect to the following issues and will therefore not address those issues in these comments: (1) sharing of 2496-2500 MHz with mobile satellite service; (2) transitions on a Basic Trading Area (“BTA”) basis rather than a Major Economic Area (“MEA”) basis; and (3) a self-transition period after expiration of the three-year transition.

around the world. To date, Clearwire has raised over \$200 million to fund its wireless broadband strategy and has acquired the use of spectrum in over 70 U.S. markets.

Through its operating subsidiaries, Clearwire already is using BRS and EBS spectrum to provide high-speed wireless Internet access service to customers in Jacksonville, Florida; St. Cloud, Minnesota; and Abilene, Texas. Clearwire's service uses a proprietary, state-of-the-art wireless modem that can be plugged into a desktop computer, a laptop, or a local network. The modem can be set up anywhere in a customer's home or office – upstairs or downstairs, inside or outside. The Clearwire connection is always-on, always-secure.<sup>3</sup>

## **II. THE COMMISSION SHOULD IMPLEMENT A COST-SHARING PLAN FOR THE BRS/EBS TRANSITION SIMILAR TO THE PLAN USED FOR PCS.**

In its new rules, the Commission suggests that all BRS licensees and BRS and EBS lessees must contribute their pro-rata share of transition costs.<sup>4</sup> The Commission, however, provides insufficient detail and guidance about how the cost-sharing mechanism will work. Clearwire urges the Commission to adopt a cost-sharing mechanism for EBS/BRS transitions similar to the Part 24 cost-sharing requirements for the broadband PCS industry when it cleared microwave incumbents. The PCS cost-sharing plan, which sunsets this year, has been successfully used by that industry, and a similar mechanism should ensure that transition costs are equitably apportioned across all entities that benefit from EBS/BRS transitions.<sup>5</sup>

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<sup>3</sup> For more detail regarding Clearwire, please see its Comments filed in response to the *Further Notice of Proposed Rulemaking* in this proceeding.

<sup>4</sup> 47 C.F.R. § 27.1233(c).

<sup>5</sup> See *id.* §§ 24.239-24.253. According to the PCIA Microwave Clearinghouse website, the clearinghouse was created as a cooperative venture in 1996 by PCS carriers. It provides the database, service and intellectual expertise that has resulted in more than \$250 million identified cost-sharing revenue to its participants. “The clearinghouse is a unique success story, as proven by its positive financial position and its world-class reputation. Representatives from Australia,  
(Footnote continues on next page.)

**A. Anyone Who Benefits From The Transition Should Contribute.**

Similar to the PCS cost-sharing scheme, the Commission should require that all BRS and EBS entities that benefit from the transition of spectrum they own or lease should proportionally contribute to the transition costs borne by proponents.<sup>6</sup> Consistent with the Commission's direction, the costs to transition the spectrum in a market<sup>7</sup> should be shared by all licensees or lessees in a market that are using BRS or EBS spectrum for commercial purposes.<sup>8</sup> Educational institutions that are using their spectrum exclusively for educational purposes should be exempt from cost-sharing obligations. EBS and BRS lessees that have less than three years remaining on their lease terms should also be exempt from cost-sharing reimbursement obligations, unless they have an assured right of renewal. If there is no such renewal right, then the cost-sharing obligation should remain with the license until a new lease agreement for the spectrum is executed. The next lessee of the spectrum should be responsible to satisfy the cost-sharing obligation with respect to that license.

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Canada, France, Taiwan, and Japan have studied the PCIA Microwave Clearinghouse operation so that they may establish similar processes in their countries. In the United States, the FCC and PCS carriers hold up the PCIA Microwave Clearinghouse as a prime example of the wireless industry regulating itself." See [http://www.pcia.com/pcia\\_microwave.htm](http://www.pcia.com/pcia_microwave.htm).

<sup>6</sup> See 47 C.F.R. § 24.239 ("All PCS entities who benefit from spectrum clearance by other PCS entities... must contribute to such relocation costs.") See also *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8825, 8864 (1996) ("*PCS Relocation Order*") ("[W]e mandate that all PCS licensees benefiting from spectrum clearance by other PCS licensees must contribute to such relocation costs.").

<sup>7</sup> In Clearwire's cost-sharing suggestions, it uses the generic term "market" to refer to the transition area. The relevant transition area could be a MEA or a BTA. Clearwire supports transitions and auctions on a BTA basis.

<sup>8</sup> 47 C.F.R. § 27.1233(c).

Clearwire proposes that the cost-sharing obligations remain tied to the license until the obligation is paid.<sup>9</sup> Thus, if an EBS license that is being used for solely educational purposes is later put to commercial use or leased for commercial purposes, a pro-rata cost-sharing obligation would be owed by the licensee or lessee (whoever is using the spectrum commercially) shortly after launch of such service (*i.e.*, within thirty days). Similarly, if a BRS or EBS license is sold before satisfaction of the cost-sharing obligation, the Commission should require satisfaction of that obligation as a condition of the assignment. This payment requirement also should apply to requests to partition or disaggregate spectrum.<sup>10</sup> Failure to satisfy cost-sharing obligations should be treated as a rule violation and should subject the wrongdoer to fines and other penalties.<sup>11</sup>

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<sup>9</sup> This approach is used for the PCS cost-sharing scheme. Upon becoming a PCS licensee (also referred to as a “late-entrant” or “subsequent” PCS licensee in the rules) the obligation to pay the licensee’s share of microwave relocation costs attaches to the extent the licensee benefits from the spectrum clearing efforts of another party and, perhaps, to the extent the relocation costs have not been paid in full. The Commission tentatively concluded that “a new entrant PCS licensee who gains its license through partitioning or disaggregation should be treated as any other subsequent PCS licensee for purposes of the relocation cost-sharing plan... unless the reimbursement obligations to which they would be subject have already been paid by the transferring licensee.” *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees*, Notice of Proposed Rulemaking, 11 FCC Rcd 10187, 10213 (1996).

<sup>10</sup> The transferability of the cost-sharing obligation was made clear when the Commission discussed the cost-sharing responsibilities for disaggregated and partitioned PCS licenses. *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21831 (1996). For purposes of microwave relocation, the new licensee (whether a partitionee or disaggregatee) is treated the same as any other late-entrant PCS licensee. “[P]artitionees and disaggregatees may seek reimbursement under the plan if they relocate incumbents and they will be required to pay their share of microwave relocation costs if they benefit from the spectrum-clearing efforts of another party, according to the cost-sharing formula adopted by the Commission.” *Id.* at 21873-74.

<sup>11</sup> The Commission emphasized its enforcement authority for PCS cost-sharing obligations: “At this time, we do not designate a specific penalty for failure to comply with cost-  
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Proponents and co-proponents that share the costs of transitioning spectrum in a market should both be entitled to cost-sharing reimbursement according to private agreement. For ease of administration, the lead proponent should receive reimbursements and apportion proceeds to co-proponent(s) according to private agreement. The co-proponents can decide which party will serve as the lead proponent.

If a proponent must transition spectrum in a neighboring market in order to successfully transition spectrum in its own market, the neighboring proponent should provide full reimbursement and then seek reimbursement from spectrum holders in its own market when transition of spectrum in its market is complete.

**B. All Transition-Related Costs Should Be Included In The Computation.**

All costs associated with transitioning spectrum in a market should be included in the base computation of costs to be shared and reimbursed.<sup>12</sup> Similar to the categories of costs that are included in the PCS cost-sharing rules, the industry should develop a list of transition-related costs to be reimbursed (*i.e.*, equipment, downconverters, costs to digitize program tracks, engineering, installation, system testing, FCC filing costs, disposal of old equipment, spare equipment, project management, legal costs, third party appraisal costs, etc.).

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sharing requirements; however, we emphasize that we intend to use the full realm of enforcement mechanisms available to us in order to ensure that reimbursement obligations are satisfied.” *PCS Relocation Order*, 11 FCC Rcd at 8865.

<sup>12</sup> WCAI working groups have been discussing an appropriate reimbursement formula for cost-sharing. Essentially, the reimbursement obligation for each benefiting entity in a market should be some pro-rata portion of the total transition costs in the market. The pro-rata portion would be calculated by considering the amount of spectrum licensed to or leased to the benefiting entity (*i.e.*, one channel, four channels, twelve channels) and the population contained in the geographic service area for the station(s) controlled by the benefiting entity (whether 35-miles protected service area or BTA).<sup>12</sup> Population numbers would be taken from year 2000 census data. Clearwire awaits further progress on this issue from the WCAI.

The costs must be fair and reasonable, and should be documented to the Commission (or an independent clearinghouse if the Commission chooses to use one), within a specified period of time (*i.e.*, 30 days) after the post-transition notification is filed with the Commission under Section 27.1235.<sup>13</sup> The documentation of the transition-related costs should itemize the amounts spent, and if the amounts exceed a certain threshold (*i.e.*, \$250,000.00), then an independent third-party appraisal of the costs should be required.<sup>14</sup>

**C. Reimbursements Should Be Required Upon Invoice After The Post-Transition Notice To The Commission.**

Reimbursement of transition-related cost-sharing expenses should be due from benefiting entities within thirty (30) days of receiving an invoice from the lead proponent.<sup>15</sup> Invoicing should not occur, however, until the market is fully transitioned and the post transition notice is filed with the Commission and served on all licensees per Section 27.1235.<sup>16</sup>

Unlike the PCS cost-sharing scheme, reimbursement should not be delayed until commercial deployment on each channel group. All EBS and BRS spectrum holders will immediately enjoy rights to more valuable, contiguous spectrum and will therefore benefit immediately from the transition. A delay in reimbursement obligations until commercial launch on a channel group will disproportionately impact new entrants that have relatively smaller spectrum holdings. It may also encourage late deployments and free riders. For example, in a market where a proponent is a new-entrant and has commercial use of just eight channels, it will

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<sup>13</sup> 47 C.F.R. § 27.1235.

<sup>14</sup> *See id.* § 24.245.

<sup>15</sup> *See id.* § 24.249(a).

<sup>16</sup> *Id.* § 27.1235.

likely have to transition the market in order to deploy wireless broadband services. Under the reimbursement scheme, this proponent would be responsible for only 25 percent of the transition-related costs. Yet, as the proponent, it would pay 100 percent of the transition costs upfront. If the remainder of the spectrum in the market is held by a company that has significant spectrum holdings around the country, and it does not intend to launch commercial service in the proponent's market in the near term, the proponent could bear the entire cost of the transition indefinitely (*i.e.*, until the other spectrum holder determines to launch service). Such a result would be inequitable and would likely lead to delayed deployments by smaller spectrum holders.

The PCS cost-sharing regulations were designed to promote and accelerate the complex relocation process in order to relocate entire incumbent microwave systems at once, and promote more rapid deployment of PCS technologies to the public. When the Commission adopted the PCS cost-sharing plan, it was concerned about "free-rider" problems:

[T]he first PCS licensee in the market potentially bears a disproportionate share of relocation costs. Subsequent PCS licensees to enter the market may therefore obtain a windfall. As a result of this potential "free rider" problem, the first PCS licensee in the market might not relocate a link or might delay its deployment of PCS if it believes that another PCS licensee will relocate the link first.<sup>17</sup>

The Commission should address this issue when it considers and adopts further cost-sharing rules for the EBS/BRS transition. Clearwire concludes that the solution to the problem is to require reimbursements upon invoice, after the post-transition notice is filed.

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<sup>17</sup> See *PCS Relocation Order*, 11 FCC Rcd at 8831, 8861-62.



**D. Cost-Sharing Disputes (And Perhaps Other Transition-Related Disputes), Should Be Referred In The First Instance To An Impartial, Experienced Clearinghouse Before Arbitration.**

To implement the PCS cost-sharing scheme, the Commission selected a third party to serve, under delegated authority, as a neutral administrator (the PCIA Microwave Clearinghouse) of the cost-sharing plan, and to maintain cost and payment records.<sup>18</sup> The Commission requires that all disputes related to the PCS cost-sharing plan be brought to the clearinghouse in the first instance for resolution and, if the dispute cannot be resolved, encourages the parties to use expedited dispute resolution procedures.<sup>19</sup> The Commission should adopt similar mechanisms for BRS and EBS transitions. The Commission should designate a clearinghouse as the first avenue of recourse for all transition-related disputes, including cost-sharing.<sup>20</sup> Having an experienced clearinghouse with a full understanding of transition issues for EBS and BRS would be extremely useful for the industry, and would help to expedite problem-solving and deployment of wireless broadband services.<sup>21</sup>

**III. CONCLUSION.**

The new regulatory framework for EBS and BRS that was adopted by the Commission in the *Report and Order* is an excellent first step to implement legal and technical rules that will promote the availability of wireless broadband services across the country. The Commission must ensure that it adopts a cost-sharing mechanism for transition-related costs that is equitable

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<sup>18</sup> See 47 C.F.R. § 24.241.

<sup>19</sup> See *id.* § 24.251.

<sup>20</sup> Clearwire notes that the cost-sharing plan for PCS sunsets on April 4, 2005 per Section 24.253 of the rules. *Id.* § 24.253. Perhaps the PCIA Microwave Clearinghouse, itself, could modify its function and serve as the clearinghouse for the wireless broadband industry.

<sup>21</sup> *Report and Order*, 19 FCC Rcd at 14203-04.

and does not encourage late-deployments or free-riders. Clearwire urges the Commission to adopt a cost-sharing mechanism for EBS/BRS transitions similar to the Part 24 cost-sharing requirements for the broadband PCS industry when it cleared microwave incumbents. The PCS cost-sharing plan has been successfully used by that industry, and a similar mechanism for EBS/BRS transitions should ensure that transition costs are equitably apportioned across all entities that benefit.

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January 10, 2004

## **CERTIFICATE OF SERVICE**

I, Theresa Rollins, certify that I have on this 10th day of January, 2005, had copies of the foregoing **PETITION FOR PARTIAL RECONSIDERATION** delivered to the following via electronic mail:

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